Public Prosecutor v Sharithan a/l Pachemuthu

HIGH COURT (KUALA LUMPUR) — CRIMINAL TRIAL NO 45–27 OF 1999
NIK HASHIM J
13 OCTOBER 1999

Criminal Procedure *— Sentence — Principles of sentencing — Possession of 18g mixture of heroin and monoacetylmorphine — Offender aged 17 years and 10 months when committing offence — Plea of guilty — Probation report shows that offender committed three previous offences of armed robbery — Whether deterrent sentence should be imposed — Dangerous Drugs Act 1952 s 39A(2)*

Criminal Procedure *— Plea of guilty — Duty of court — Charged under s 39A(2) of Dangerous Drugs Act 1952 — Offender pleaded guilty to charge of possession of dangerous drugs after facts were read to him — Whether offender was misled occasioning failure of justice when he pleaded guilty to offence of possession under s 39A(2) instead of s 12(2)*

The offender — who was 17 years and 10 months old when the offence was committed — was originally charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking 18g of a mixture of heroin (13.5g) and monoacetylmorphine (4.5g). However, on the day of the trial, the prosecution reduced the charge to one of possession thereof, and the charge was amended to s 39A(2) of the Act. After the facts of the case were presented by the prosecution, the offender pleaded guilty to the charge of possession. The judge accepted the plea and found him guilty. In mitigation, counsel for the offender requested that the offender be detained in the Henry Gurney School. The learned deputy public prosecutor asked for a deterrent sentence as the offender's probation report showed that the offender had committed three previous offences of armed robbery. At the time of writing the judgment, it was discovered that the amended charge of *possession* was wrongly stated to be under s 39A(2) instead of s 12(2) of the Act.

Held, convicting the offender and sentencing him to imprisonment for six years from the date of arrest and ten strokes:

(1) The offender had truly pleaded guilty to the charge of *possession* which was an offence punishable under s 39A(2) of the Act. The offender also understood the charge, the nature and consequences of his guilty plea and admitted the facts of the case to be true, without any reservation whatsoever, and as the offender was not misled by the irregularity, no failure of justice was caused in this case (see p 371H–I).

(2) Having regard to the offender's background and character as disclosed in the probation report and the nature of the offence charged, the offender could not be suitably dealt with any other way except with the punishment as provided for under the Act, even though he had pleaded guilty and had cooperated with the police. Persons indulging in the offence of drug possession are a

scourge to society and unless the courts treat deterrence and the public interest as vital factors in sentencing, the whole purpose of enacting s 39A(2) which imposed a life sentence or imprisonment not less than five years and whipping of not less than ten strokes would be meaningless. Thus, in this type of offence, the public interest should never be relegated to the background and must of necessity assume the foremost importance (see p 373A, H–I); *PP v Saiful Afikin bin Mohd Firus* [1996] 4 MLJ 309 and *PP v The Offender* [1998] 4 MLJ 152 distinguished.

(3) The accused person, on a plea of guilty, would normally be given credit or discount of between $^1/_4$ and $^1/_3$ off the sentence that would have been imposed had the accused been tried and found guilty. Taking everything into account, ten years imprisonment would have been a reasonable punishment for the offence had the offender been tried and found guilty. But since the offender had pleaded guilty, was a young person and had cooperated with the police, a $^1/_3$ discount was given (see p 374C–E).

[Bahasa Malaysia summary

Pesalah — yang berumur 17 tahun dan 10 bulan apabila kesalahan dilakukan — telah dituduh pada mulanya di bawah s 39B(1)(a) Akta Dadah Berbahaya 1952 ('Akta tersebut') kerana mengedar 18g campuran heroin (13.5g) dan monoacetylmorphine (4.5g). Namun, pada hari perbicaraan, pihak pendakwaan telah meringankan pertuduhan kepada milikan, dan pertuduhan telah dipinda kepada s 39A(2) Akta tersebut. Selepas fakta-fakta kes dikemukakan kepada pihak pendakwaan, pesalah telah mengaku bersalah kepada pertuduhan milikan. Mahkamah telah menerima pengakuan tersebut dan mendapati beliau bersalah. Semasa hujah meringankan hukuman, peguam untuk pesalah meminta pesalah ditahan di Sekolah Henry Gurney. Timbalan pendakwa raya yang arif meminta suatu hukuman pencegahan oleh kerana laporan tempoh percubaan pesalah menunjukkan bahawa pesalah telah melakukan tiga kesalahan rompakan bersenjata terdahulu. Semasa menulis penghakiman tersebut, adalah didapati bahawa pertuduhan *milikan* yang dipinda telah dinyatakan dengan salah di bawah s 39A(2) dan bukan s 12(2) Akta tersebut.

Diputuskan, mensabitkan pesalah dan menghukumnya ke pemenjaraan selama enam tahun dari tarikh penahanan dan sepuluh sebatan rotan:

(1) Pesalah telah mengaku bersalah kepada pertuduhan milikan yang merupakan kesalahan yang boleh dihukum di bawah s 39A(2) Akta tersebut. Memandangkan pesalah juga memahami pertuduhan tersebut, bentuknya dan juga akibat-akibat pengakuan bersalahnya dan mengaku fakta-fakta tersebut sebagai

benar, tanpa sebarang keraguan, tiada ketidakadilan telah diakibatkan di dalam kes ini (lihat ms 371H–I).

(2) Memandangkan latar belakang dan perwatakan pesalah seperti yang didedahkan di dalam laporan tempoh percubaan dan juga jenis kesalahan yang dituduhkan, pesalah tersebut tidak boleh ditangani dengan cara lain kecuali hukuman yang diperuntukkan di bawah Akta, walaupun beliau telah mengaku bersalah dan telah bekerjasama denagn polis. Orang yang terlibat di dalam kesalahan memiliki dadah adalah sampah masyarakat dan selagi mahkamah tidak menganggap pencegahan dan kepentingan awam sebagai faktor-faktor yang penting semasa menghukum, keseluruhan tujuan untuk menggubal s 39A(2) yang mengenakan hukuman seumur hidup atau pemenjaraan tidak kurang dari lima tahun atau sebatan tidak kurang daripada sepuluh sebatan akan tidak bermakna. Oleh itu, di dalam kesalahan sebegini, kepentingan awam tidak patut diketepikan daripada pertimbangan dan mesti atas dasar keperluan mendapat kepentingan yang sewajarnya (lihat ms 373A, H–I); *PP v Saiful Afikin bin Mohd Firus* [1996] 4 MLJ 309 dan *PP v The Offender* [1998] 4 MLJ 152 dibezakan.

(3) Tertuduh, di atas pengakuan bersalah, biasanya akan diberikan potongan kredit atau diskaun $^1/_4$ dan $^1/_3$ hukuman yang akan dikenakan jikalau tertuduh dibicarakan dan didapati bersalah. Dengan mengambil kira semuanya, sepuluh tahun pemenjaraan adalah hukuman yang munasabah untuk kesalahan tersebut jika pesalah dibicarakan dan didapati bersalah. Oleh kerana pesalah yang telah mengaku bersalah adalah seorang muda dan telah bekerjasama dengan polis, diskaun $^1/_3$ telah diberikan (lihat ms 374C–E).]

Notes

For cases on possession of dangerous drugs, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 2650–2653.

For cases on youthful offender, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3045–3048.

Cases referred to

Pendakwa Raya lwn Wahid bin Yaakob [1996] 5 MLJ 29 (refd)
PP v Nazarudin bin Ahmad & Ors [1993] 2 MLJ 9 (refd)
PP v Saiful Afikin bin Mohd Firus [1996] 4 MLJ 309 (distd)
PP v The Offender [1998] 4 MLJ 152 (distd)

Legislation referred to

Criminal Procedure Code (FMS Cap 6) s 294
Dangerous Drugs Act 1952 ss 12(2), 39A(2), 39B(1)(a), (2), First Schedule

A Juvenile Courts Act 1947 ss 12(1)(d), 15, 21, 40
Penal Code (FMS Cap 45) ss 304, 392, 397

Lukman bin Zainuddin (Attorney General's Chambers) for the Public Prosecutor.

M Sathia (*M Sathia & Associates*) for the accused.

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Cur Adv Vult

Nik Hashim J: The offender, who was 17 years and 10 months when he committed the offence, was originally charged under s 39B(1)(a) of the Dangerous Drugs Act 1952 ('the Act') for trafficking 18g of mixture of C heroin (13.5g) and monoacetylmorphine (4.5g). However, on the day of the trial, the prosecution, upon representation by the offender, reduced the charge to one of possession thereof, an offence punishable under s 39A(2) of the Act.

The facts of the case presented by the prosecution showed that the D offender was stopped and searched by a police party led by police inspector Mohd Azam in a restaurant at Jalan Hang Kasturi, Kuala Lumpur. During the search, the offender was found to have in his right hand a tracksuit from which the police recovered a plastic bag. Inside the bag, there were two packages containing 150 small packets of pinkish granular and powdery substance suspected to be heroin. The offender was arrested and was E subsequently brought to Jabatan Narkotik IPK, Kuala Lumpur together with the contents of the bag. A police report was lodged. The chemist report confirmed that the 150 packets contained pinkish granular and powdery substance which contained 13.5g of heroin, and 4.5g of monoacetylmorphine and they are dangerous drugs as listed under the First Schedule to the Act.

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On being satisfied that the offender understood the charge, the nature and consequences of his plea of guilty without qualification, I found him guilty, and after hearing his learned counsel in mitigation for the offender to be detained in the Henry Gurney School and the learned deputy public prosecutor in reply for a deterrent sentence, and having perused the G probation report on the offender, I on 30 September 1999, convicted the offender and sentenced him to six years' imprisonment effective from the date of arrest ie 23 July 1998 and ordered to be given the mandatory ten strokes of the cane.

I now give my reasons for so doing.

H At the time of writing this judgment, I discovered that the offence of *possession* as per amended charge (P3) was wrongly stated to be under s 39A(2) instead of s 12(2) of the Act. However, I was satisfied that the offender had truly pleaded guilty to the charge of *possession* which is an offence punishable under s 39A(2) of the Act and he understood the charge, the nature and consequences of his guilty plea and admitted the facts of the I case to be true, without any reservation whatsoever. Therefore, the offender was not misled by the irregularity and as such, no failure of justice was caused in this case.

It is to be noted that the offence under consideration is the fourth offence that the offender had committed. The other three offences were:

(i) On 26 June 1997 — Armed robbery under ss 392 and 397 of the Penal Code (FMS Cap 45) ('the Code'), vide Juvenile Court Rawang case No 84–27–1997. On 6 November 1997 the offender was ordered to be released on bond for three years to be under the care of his parents and probation officer in the sum of RM 5,000 under ss 12(1)(d) and 21 of the Juvenile Courts Act 1947 ('the JCA').

(ii) On 27 October 1997 — Armed robbery under ss 392 and 397 of the Penal Code vide Magistrates' Court Rawang vide case No 83–717–1997. On 23 November 1998 the offender was ordered to be detained in Henry Gurney School until he reaches the age of 21 years.

(iii) On 5 November 1997 — Armed robbery under s 392 and 397 of the Penal Code vide magistrates' court vide case No 83–716–1997. On 28 January 1999, the offender was ordered to be detained in Henry Gurney School until he reaches the age of 21 years.

From the above record, it is clear that the present offence was committed during the period of bond in respect of the first offence.

Learned counsel for the offender pleaded to the court that the offender should be given another chance for him to continue serving the detention in the Henry Gurney School concurrently with the orders in respect of the earlier two offences until he reaches the age of 21 years, and cited among others, two cases:

(i) *PP v Saiful Afikin bin Mohd Firus* [1996] 4 MLJ 309, and

(ii) *PP v The Offender* [1998] 4 MLJ 152,

in support.

The offence under which the offender was charged is a very serious offence under the law. The punishment under s 39A(2) is imprisonment for life or for a term which shall not be less than five years and whipping of not less than ten strokes.

For the purpose of this charge, the relevant age to be considered by the court is the age when the offender committed the offence and not the age at the time of the sentence. At the material time, the offender was a young person, being above 14 and under 18 years of the age, and at the date of the sentence before me he was 19 years 18 days' old.

There are, however, restrictions on punishment of young persons under s 15 of the JCA, which this High Court must have regard to before considering a suitable punishment on a young person (see s 40 of the JCA). Section 15 of the JCA provides:

> (1) ...
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> (2) No young person shall be sentenced or ordered to be imprisonment *if he can be suitably dealt with in any other way* whether by probation, fine, or committed to a place of detention, approved school, or Henry Gurney School, or otherwise. (Emphasis added.)

A Having regard to his background and character as disclosed in the probation report (P18) which the offender admitted to be true, and the nature of the offence charged, I found the offender could not be suitably dealt with any other way except with the punishment as provided for under the Act, even though he had pleaded guilty and had cooperated with the police. The option of probation, fine, or committed to a place of detention, approved B school or Henry Gurney or even binding over under s 294 of the Criminal Procedure Code (FMS Cap 6) is not suitable as this is a very serious offence.

The probation report was not in his favour. Beside this offence, the offender had committed three armed robberies, two of which were C committed during the period of bond in respect of the first offence. Therefore, he had disregarded the bond that his parents had executed for his proper care and he had also ignored the probation order. He failed to make good use of the opportunity during the bond to turn over a new leaf. Instead, he resorted to more crimes. Thus, by committing this offence, the offender did not seem to have repented and learned a lesson to lead an D honest living. He was not too young and immature as not to know what he was doing. He had even told his mother that he wanted to be rich so that his family and relatives would love him (see P18, *Hal-hal lain*, para 1). Since he was so brave to commit this offence, he must also be brave to suffer the penalties prescribed by law.

E The seriousness of the offence needs no further emphasis. However, if an illustration of its seriousness is still needed, then, I can do no better than to refer to a recent pronouncement by the Government on the matter. On 12 July 1999 the Deputy Prime Minister and Minister of Home Affairs was quoted in *The Star* at front page under the headline 'Joint war — Pak Lah calls for all-party offensive against drug menace' and said:

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> ... The drug problem did not distinguish between political ideology, race or religion or between rich and poor. Describing the drug menace as the biggest threat to the country, he said, it was vital for all parties to join hands and minds to fight it effectively for the good of society ...
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> We have been waging war against drugs for such a long time and we are still at it. We managed to overcome even the communist insurgency problem G within a shorter period of time ...
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> ... The drug problem is a danger facing us all ...
>
> He pointed out if the drug problem was treated lightly, it could spread and escalate to 'emergency levels' ... .

H Persons indulging in this type of offence are a scourge to society and unless the courts treat deterrence and the public interest as vital factors in sentencing, the whole purpose of enacting s 39A(2) which imposes a life sentence or imprisonment not less than five years and whipping of not less than ten strokes would be meaningless. Thus, in this type of offence the public interest should never be relegated to the background and must of I necessity assume the foremost importance. Hence, the offender must be punished accordingly.

This case is readily distinguishable from the two cases cited by the learned counsel and thus, they are not applicable to the instant case.

Saiful Afikin charged under the first limb of s 304 of the Code was a first offender and being 16 years old was younger by one year ten months than the offender in this case. The court there suitably committed Saiful to Henry Gurney School until he attained the age of 21 years. However in *PP v Nazarudin bin Ahmad & Ors* [1993] 2 MLJ 9 the third accused a young person under 18 years old and a first offender was sentenced to five years imprisonment for the offence of culpable homicide not amounting to murder under the first limb of s 304 of the same Code.

In *The Offender* the offender there was even younger only 14 years 1 month old when he committed a similar offence as the offender in this case. But the probation report of the offender was not adverse to him unlike the one in this case. Moreover the weight of the drugs there was only 1.8g heroin and 4.8g monoacetylmorphine a total of 6.6g; whereas in the instant case the total weight of the drugs was 18g. Therefore, the High Court there rightly ordered the offender to an approved school.

However, it has been an accepted practice that the accused person on a plea of guilty be given credit or discount of between $^1/_4$ and $^1/_3$ off the sentence that would have been imposed had the accused been tried and found guilty (*Pendakwa Raya lwn Wahid bin Yaakob* [1996] 5 MLJ 29).

Thus, taking everything into account I considered ten years imprisonment would be reasonable punishment for the offence had the offender been tried and found guilty. But since he had pleaded guilty and being a young person and had cooperated with the police, I gave him $^1/_3$ discount and convicted and sentenced him to six years imprisonment and ten strokes of the cane. Indeed, it is hoped that the sentence imposed would make the offender realize the consequence of his foolish acts and at the same time, it would raise the public's awareness of the seriousness of the offence under the Act.

Offender convicted and sentenced.

Reported by Chin En Tek